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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
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12 Ramon Lopez,)
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14) Petitioner,) No. CR 92-00427-002-PHX RCB
15)
16) vs.) O R D E R
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28)
United States of America,)
Respondent.)
_____)

18 Petitioner *pro se*, Ramon Lopez, is serving a 240 month
19 sentence for conspiracy to possess with intent to distribute
20 heroin, and for possession with intent to distribute heroin.
21 Currently pending before the court is "Defendant['s] Own
22 Motion for Sentencing Reduction Pursuant to 18 U.S.C.
23 § 3582(c)(2) Federal Rules of Criminal Procedure Rule 35,
24 effective December 1, 2009" (emphasis omitted) (doc. 113).
25 In United States v. Lopez, 2009 WL 1259268 (D.Ariz. May 6,
26 2009) ("Lopez I"), this court held that it "lack[ed]
27 jurisdiction to modify or reduce [petitioner's] sentence
28 pursuant to 18 U.S.C. § 3582(c)(2)." See id. at *2 (citation

omitted). There have been no changes from that time to this warranting a different result now. Thus, for the same reasons articulated in Lopez I, section 3582(c)(2) does not confer jurisdiction upon this court to consider this motion to reduce petitioner's sentence. Fed. R. Crim. Proc. 35 also does not provide a jurisdictional basis for this motion, as explained below. Finally, as also explained below, even if the court had jurisdiction, this motion lacks merit. Thus, the court denies petitioner Lopez' motion in its entirety.

Background

The factual background taken verbatim from Lopez I is as follows:

At his December 6, 1993 sentencing, [petitioner] was held accountable for 1,049 grams of heroin, which, under the United States Sentencing Guidelines ('USSG') then in effect, resulted in a corresponding Total Offense Level of 32. . . . That, in combination with six criminal history points, placed [petitioner] in a Criminal History Category of III. . . . Based upon the foregoing, [petitioner] faced a [USSG] range of 151 to 188 months imprisonment [Petitioner's] prior felony drug conviction took him outside that sentencing range, however. Due to that prior conviction, this court was statutorily mandated to sentence [petitioner] to a term of imprisonment which may not be less than 20 years.

The Ninth Circuit Court of Appeals affirmed [petitioner's] conviction. . . . It also later affirmed this court's denial of [petitioner's] motion to disclose grand jury materials in connection with his conviction. . . . Defendant next filed a motion to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255 . . . , which this court ultimately denied. . . .

Lopez I, 2009 WL 1259268, at *1 (citations and internal quotation marks omitted). Six and a half years after that denial, petitioner filed a motion for modification or reduction of his sentence, which the court denied for lack of

1 jurisdiction. Id. at *2.

2 In this motion for a reduction in his sentence,
3 petitioner notes that "the court *may* reduce the . . . term of
4 [his] imprisonment, considering the factors set forth in
5 section 3553(a) to the exten[t] that they are
6 [a]pplicable[.]" Mot. (doc. 113) at 1 (emphasis added).
7 That statute enumerates the factors which a court must
8 consider in imposing a sentence. In arguing for a
9 "down[ward] departure" of an unspecified duration, petitioner
10 relies upon "his status as [a] deportable alien," as well as
11 his purported "eligib[ility] for the early release program"
12 for convictions based upon "nonviolent crimes." Id.

13 The United States of America did not file a response to
14 this motion. Because the court so clearly lacks
15 jurisdiction, it deemed a response by the government
16 unnecessary, and is resolving this matter based upon
17 petitioner's motion and the applicable law.

18 Discussion

19 I. Jurisdiction

20 As a court of limited jurisdiction, this district court
21 must address the threshold issue of whether jurisdiction
22 exists here. See U.S. Jacobo Castillo, 496 F.3d 947, 951 (9th
23 Cir. 2007). Generally, "a 'court . . . may not correct or
24 modify a prison sentence once it has been imposed' unless
25 permitted by statute or Rule of Criminal Procedure 35."
26 Reynaga v. United States, 2009 WL 1324768, at *1 (E.D.Cal.
27 May 12, 2009) (quoting United States v. Penna, 319 F.3d 509,
28 511 (9th Cir. 2003)).

1 Approximately five months after Lopez I, anticipating the
2 amendments to the Federal Rules of Criminal Procedure, which
3 took effect on December 1, 2009, petitioner filed this motion
4 for a reduction in sentence. Petitioner's motion can be read
5 as asserting two jurisdictional bases: (1) 18 U.S.C.
6 §3582(c)(2); and (2) Fed. R. Crim. Proc. 35, which the court
7 will address in reverse order.

8 **A. Fed. R. Crim. Proc. 35(a)**

9 Petitioner does not explicitly rely upon Rule 35(a) as a
10 jurisdictional basis for this motion. However, because
11 petitioner is invoking that Rule on the merits, and due to
12 his *pro se* status, the court must consider whether Rule 35(a)
13 grants it jurisdiction to entertain the pending motion.

14 Pursuant to 18 U.S.C. 3582(c)(1)(B), "the court may
15 modify an imposed term of imprisonment to the extent
16 otherwise expressly permitted by statute or by Rule 35 of the
17 Federal Rules of Criminal Procedure[.]" 18 U.S.C. § 3582(c)
18 (West Supp. 2009). As with 90 other rules of Federal
19 Appellate, Bankruptcy, Civil and Criminal Procedure,
20 effective December 1, 2009, Fed. R. Crim. Proc. 35, was
21 amended to revise the time period set forth therein. In
22 particular, subsection (a) of that Rule was amended to
23 provide that "within 14 days after sentencing," rather than
24 seven as previously allowed, "the court may correct a
25 sentence that resulted from arithmetical, technical, or other
26 clear error." Fed. R. Crim. Proc. 35(a) (eff. Dec. 1, 2009).

27 Petitioner was sentenced on December 6, 1993. Thus,
28 regardless of whether the time frame under Rule 35(a) is

1 seven or 14 days, it has long since passed. Accordingly, the
2 court does not have jurisdiction to reduce petitioner's
3 sentence under that Rule. See United States v. Morales, 328
4 F.3d 1202, 1204 (9th Cir. 2003) (citation omitted) (district
5 court lacked jurisdiction under Rule 35(a) to modify sentence
6 where defendant sought such relief in a motion brought
7 "approximately ten years after [his] sentencing[]"); see also
8 United States v. Chan, 2007 WL 2949552, at *2 (N.D.Cal.),
9 aff'd without pub'd opinion, 294 Fed.Appx. 262 (9th Cir.
10 2007)(court "no longer ha[d] jurisdiction" pursuant to Rule
11 35(a) where defendant brought motion to reduce her
12 restitution, which was part of her sentence, four and a half
13 years after sentencing); and United States v. Woodruff, 2008
14 WL 906808, at *2 (N.D.Cal. April 3, 2008) (citation omitted)
15 (court lacked jurisdiction to "revisit defendant's
16 restitution judgment[]" where Rule 35(a)'s "seven-day window
17 after defendant's sentencing closed more than nine years
18 before defendant filed [his motion[]").

19 **B. 18 U.S.C. § 3582(c)(2)**

20 For the same reasons identified in Lopez I, petitioner's
21 asserted statutory basis for jurisdiction also does not
22 apply. As previously alluded to, the court's jurisdictional
23 analysis in Lopez I applies with equal force here. In Lopez
24 I this court explained that it lacked jurisdiction for the
25 following reasons:

26 Section 3582(c)(2), . . . , severely restricts
27 the circumstances under which a court may modify
a term of imprisonment:

28 The court may not modify a term of imprisonment

1 once it has been imposed *except that* ... in the case
2 of a defendant who has been sentenced to a term of
3 imprisonment based on a *sentencing range* that has
4 *subsequently* been lowered by the Sentencing
5 Commission pursuant to 28 U.S.C. 994(o), upon motion
6 of the defendant or the Director of the Bureau of
7 Prisons, or on its own motion, the court may reduce
8 the term of imprisonment, after considering the
9 factors set forth in section 3553(a) to the extent
10 that they are applicable, if such a reduction is
11 consistent with applicable policy statements issued
12 by the Sentencing Commission.

13 18 U.S.C. § 3582(c)(2) (West 2000) (emphasis added).
14 The fundamental flaw with [petitioner's] argument
15 is that he was not 'sentenced to a term of imprisonment
16 *based on a sentencing range* that has been subsequently
17 lowered by the Sentencing Commission[,]' as that statute
18 mandates. See *id.* (emphasis added). Rather, . . .
19 Lopez' sentence was imposed in accordance with section
20 841's statutory minimum. Thus, [petitioner] is mistakenly
21 relying upon '§ 3582(c)(2), which creates jurisdiction
22 where the 'sentencing range' has been lowered[.]' See
23 *U.S. v. Orantes-Arriaga*, 244 Fed.Appx. 151, 152 (9th Cir.
24 Aug. 1, 2007). Given that [petitioner] was sentenced
25 pursuant to a statute, and not under the USSG, there was
26 no 'sentencing range' which could be subsequently lowered
27 by the Sentencing Commission. Consequently, § 3582(c)(2)
28 does 'not confer jurisdiction on th[is] district court to
resentence' . . . Lopez. See *id.* (citation omitted).

17 Lopez I, 2009 WL 1259268, at *2. The court further explained:

18 Jurisdiction is lacking . . . for the additional reason
19 that even if [petitioner] had not been subject to a
20 statutory minimum, his USSG range is exactly the same now
21 as it was at his 1993 sentencing. In 1993, 1,049 grams of
22 heroin resulted in an offense level of 32; the same is
23 still true today. . . . Likewise, [a] level 32 offense,
24 with a criminal history category of III, still results in
25 a sentencing range of 151-188 months. . . . Thus, even
26 if [petitioner's] 1993 sentence had been imposed pursuant
27 to the USSG range, there has not been an amendment
28 thereto which actually lowers that range. Consequently,
this court lacks jurisdiction to modify or reduce
[petitioner's] sentence pursuant to 18 U.S.C.
§ 3582(c)(2).

26 Id. (citations and internal quotation marks omitted).

27 Adopting this prior reasoning in full, and on the basis
28 thereof, the court finds that section 3582(c)(2) does not

1 confer jurisdiction upon it to entertain this motion for a
2 reduction in sentence. For the foregoing reasons, neither 18
3 U.S.C. § 3582(c)(2) nor Rule 35 provide a jurisdictional
4 basis for this court to entertain petitioner's motion.

5 **II. Merits**


6 Despite its lack of jurisdiction, again taking into
7 account petitioner's *pro se* status, the court will comment
8 upon the merits, or, more appropriately, the lack thereof as
9 to this motion. Petitioner specifically seeks "reduc[tion]
10 [of his] sentence in accordance with the . . . amendment" of
11 Rule 35(a), which recently went into effect. Mot. (doc. 113)
12 at 1 (emphasis added). Petitioner Lopez is correct in noting
13 Rule 35's recent amendment. However, that amendment has no
14 bearing on the merits of petitioner's motion because he is not
15 claiming any "arithmetical, technical, or other clear error."
16 See Fed. R. Crim. Proc. 35(a). Therefore, even assuming,
17 *arguendo*, the court has jurisdiction, on the merits, Rule 35
18 cannot form the basis for reducing petitioner's sentence. See
19 United States v. Vega, 2007 WL 1367719, at *1 (W.D.Wash.)
20 (defendant failed to make a "viable Rule 35 request[]" where
21 he did "not identify any 'clear error' in the judgment"),
22 reconsideration denied, 2007 WL 1655229 (W.D.Wash. June 6,
23 2007), aff'd without pub'd opinion, 316 Fed.Appx. 644 (9th Cir.
24 2009). In short, not only does the court lack jurisdiction to
25 consider this motion, but even if it had jurisdiction, there
26 is no basis for reducing petitioner's sentence.

27 **Conclusion**

28 Because the court lacks jurisdiction, it hereby ORDERS

1 that the "Motion for Sentencing Reduction Pursuant to 18
2 U.S.C.A. §3582(c)(2) Federal Rules of Criminal Procedure Rule
3 35, effective December 1, 2009" by petitioner Ramon Lopez
4 (doc. 113) is DENIED.

5 DATED this 9th day of December, 2009.

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9 Robert C. Broomfield
Senior United States District Judge

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15 Copies to counsel of record and petitioner *pro se*
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